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# Russian Web Sites Jeopardize U.S. Users: The Dangers of Importing Copyrighted Material over the Internet

By JAMES CHAPMAN\*

## Introduction

In 2001, while the Recording Industry Association of America (RIAA) was finally starting to score some legal victories against peer-to-peer (P2P) file sharing networks, a new threat to the music industry appeared in Russia.<sup>1</sup> This threat came in the form of Russian web sites offering to sell electronic versions of copyrighted music over the Internet for pennies a song. Protected by international borders and favorable domestic legal constraints, these Russian music distributors do not claim “information wants to be free;” rather, they sell music over the Internet much like iTunes. Unlike iTunes and other Internet vendors, however, these vendors sell songs at much lower prices and without anti-piracy protections. The web sites claim the right to sell the music under Russian law,<sup>2</sup> and unknowing purchasers are buying music believing they have finally found a cheap, legal, and moral alternative to domestic vendors and P2P networks.

Purchasers have taken the web sites’ assurances of legality at face

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\* J.D. Candidate, University of California, Hastings College of the Law, 2006. I would like to thank Professor Margreth Barrett for her questions and comments.

1. There are numerous such web sites, but for simplicity’s sake this note will focus on the two dominant ones: [www.allofmp3.com](http://www.allofmp3.com) (AllofMP3) and [www.mp3search.ru](http://www.mp3search.ru) (MP3Search).

2. AllofMP3 bases this upon a license (# LS-3M-05-03) from the Russian Multimedia and Internet Society (RMIS). AllofMP3, *Is It Legal to Download Music From Site AllofMP3.com?*, at [help.allofmp3.com/help/help.shtml?gs=942&pprm=1](http://help.allofmp3.com/help/help.shtml?gs=942&pprm=1) (visited Feb. 5, 2005). MP3Search bases this upon a license (# LS-R,V,Z-01-17) from the “Russian Organization For Multimedia and Digital Systems” (ROMS). MP3Search, *Legality*, at [www.mp3search.ru/legal.html](http://www.mp3search.ru/legal.html) (visited Feb. 5, 2005). Despite AllofMP3’s claim, it appears to have lost its license from ROMS. MusicAlly, *Russian 5¢ MP3 site ‘unlicensed’*, at [www.theregister.co.uk/2004/05/05/russian\\_mp3\\_site/](http://www.theregister.co.uk/2004/05/05/russian_mp3_site/) (visited Feb. 5, 2005).

value, but unfortunately, the cliché about things that are too good to be true seems appropriate. Some of the purchasers believe that Russian law governs the purchase of music from Russian web sites, which appears to allow the sales for the time being. However, whatever Russian law may or may not say on the topic, it is the laws of the user's own state that ultimately bind a person, even when transacting with foreign persons.<sup>3</sup>

Other purchasers in the United States have relied upon a provision in the U.S. copyright law that permits a person to import one copy of one work.<sup>4</sup> In effect, these users are claiming that downloading music is the same as importing a CD. The argument is essentially: "If I bought one CD on the streets of Russia for a couple of bucks, and brought it back to the United States, I would not be breaking the law. Purchasing on the Internet is just another way of buying the music in Russia and importing it to the United States." Ethically, both acts infringe upon the copyright holder's rights in the same manner; therefore, it would be logical to assume that the exception for importation would apply to both transactions. The problem with this logic is that the exception for importation is based upon a legal technicality, not an ethical principal. Data purchased over the Internet is fundamentally different from the purchase of a CD in the real world because a CD is a tangible item and an electronic signal is not. Simply stated, if nothing tangible is brought into the United States, then nothing has been imported. Even if a user is legally purchasing music in Russia for argument's sake, that user is creating an illegal copy when she downloads the file to her computer. These common misunderstandings of the copyright law may be placing purchasers of music from these Internet sites in danger of criminal and civil sanctions. My purpose in writing this note is to clarify some of the relevant issues involving the downloading of copyrighted material from foreign sources.

### The Services

One may wonder why a person would ever purchase music from these foreign music retailers when there are less questionable online sellers such as iTunes, or free sources such as Kazaa. These Russian web sites have significant advantages over both the conventional online retailers and the illegal P2P file sharing networks. While I do not wish to promote these web sites, I believe it is important for the reader to understand the appeal

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3. See generally JACK L. GOLDSMITH, *Against Cyberanarchy*, in WHO RULES THE NET? INTERNET GOVERNANCE AND JURISDICTION, 31-70 (Adam Thierer & Clyde Wayne Crews, Jr., eds., 2003).

4. 17 U.S.C. § 602(a)(2) (2005).

they provide and why in some ways they may be more dangerous to the music industry than the P2P file sharing networks. If the reader is encouraged to make purchases from this article, it is important to note from the beginning that these actions are an infringement of a copyright holder's rights.

These music-distribution web sites may not strictly be a Russian phenomenon; however, the Russian Federation thus far does appear to be the dominant location for them. Unfortunately, this is likely a function of the current corruption and lawlessness in Russia. AllofMP3 sells songs in various file formats and sample rates for 1¢ per megabit;<sup>5</sup> therefore, a song will cost from 5¢ to 20¢ depending upon the length and quality of the file. MP3Search sells songs for either 5¢ or 10¢ a song, but the songs are only available in one file format and sample rate.<sup>6</sup> A higher sample rate will produce a better quality of sound, and different file formats are usable by different players and can have other advantages in comparison to each other. Both web sites are available in both English and Russian, indicating both sites actively sell songs beyond the borders of Russia. In February of 2005, MP3Search claimed to have over 700,000 visitors every week, of which 400,000 were non-Russian.<sup>7</sup> By comparison, iTunes received 857,000 visits to its site for the week ending August 22, 2004.<sup>8</sup> Assuming the numbers from MP3Search are correct, and given the fact that iTunes is currently the largest online music distributor,<sup>9</sup> it is hard to imagine how these web sites are not having an impact upon the legal sale of music.

The dramatic difference in price provides the major advantage for these web sites over other web music distributors. iTunes currently offers music for 99¢ per song,<sup>10</sup> and Wal-Mart offers songs for 88¢.<sup>11</sup> As a result, a user can get between 10 and 20 songs from the Russian web sites for the same price of one song from the conventional web music distributors. With that much of a price advantage, it is understandable why users are overlooking some of the legal and moral questions of their purchases.

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5. Museekster, *AllofMP3.Com*, at <[www.museekster.com/allofmp3info.htm](http://www.museekster.com/allofmp3info.htm)> (visited Feb. 5, 2005).

6. Museekster, *MP3Search.Ru*, at <[www.museekster.com/clubmp3searchinfo.htm](http://www.museekster.com/clubmp3searchinfo.htm)> (visited Feb. 5, 2005).

7. MP3Search, *Advertising on www.mp3search.ru*, at <[www.mp3search.ru/adv.html](http://www.mp3search.ru/adv.html)> (visited Feb. 5, 2005). Mp3Search has since removed this link.

8. *Music Web Sites*, CHI. TRIB., Sept. 2, 2004, at 5.

9. Monica Roman, *Yahoo! Raises The Volume*, BUS. WK., Sept. 27, 2004, at 56.

10. MP3.Com, *iTunes*, at <[www.mp3.com/tech/services\\_21220230\\_overview.php](http://www.mp3.com/tech/services_21220230_overview.php)> (visited Feb. 5, 2005).

11. MP3.Com, *Wal-Mart*, at <[www.mp3.com/tech/services\\_00000007\\_overview.php](http://www.mp3.com/tech/services_00000007_overview.php)> (visited Feb. 5, 2005).

Another major advantage these web sites offer is that they are not limited by the licensing agreements with record labels, which often restrict the songs that are available for download.<sup>12</sup> In the past few years, the selection of music on the domestic web sites has improved, but a user still must often search through several sites to find one particular song. If one wishes to find something a little more obscure, that person will often be forced to go back to the real-world retail sellers.

Most of the conventional online distributors use Digital Rights Management (DRM) encryption; however, the Russian web sites are able to offer their music free of this encryption. DRM encryption limits the purchaser's ability to transfer the downloaded files between computers and digital music players, and it limits a purchaser's ability to record the music to a CD.<sup>13</sup> While these encryption techniques are intended to protect a copyright holder's right to control the distribution of her works, they also have the effect of impairing the usefulness of the work to a purchaser. For instance, files purchased at the Wal-Mart online music store may only be transferred to three computers.<sup>14</sup> If you replace your computer every two years, then you have really only rented the music for six years because you will need to repurchase the music when you get your fourth computer. You will be able to enjoy the music for even less time if you put the music files on both a desktop and laptop computer. The technologies have been largely ineffective at preventing piracy due to the relative ease of circumvention, but they often impair a lawful purchaser's fair use of the content.<sup>15</sup> Another problem with DRM encryption is that it tends to force users to purchase new players when new DRM technology is implemented in the music distribution system. In order to read files with DRM encryption a player must contain the technology to decrypt the information. Many digital music players that are only a few years old simply cannot read files from iTunes and Wal-Mart because of DRM encryption. The cost of replacing old digital players with new DRM equipped players may be cost prohibitive to many users.

The Russian distributors also have advantages over the clearly illegal

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12. The Russian web sites are selling music files from bands such as The Beatles who have refused to sign agreements with distributors like iTunes. Kevin Maney, *File-sharing War Won't Go Away; It'll Just Go Abroad*, USA TODAY, Apr. 6, 2005, at 10B.

13. MICHAEL A. EINHORN, MEDIA, TECHNOLOGY AND COPYRIGHT 47 (2004).

14. MP3.Com, *supra* note 11.

15. *Competition, Innovation, and Public Policy in the Digital Age: Is the Marketplace Working to Protect Digital Creative Works? Before Senate Comm. On The Judiciary*, 107 Cong. 89-92 (2002) (statement of Edward W. Felton, Associate Professor of Computer Science, Princeton University) (Mar. 11, 2002).

P2P file sharing networks.<sup>16</sup> While it is true that P2P networks offer free music, they are not free of problems beyond the obvious legal and moral difficulties. Some examples of problems are: 1) desired songs may not be available on the networks; 2) transfer rates may be slow; and 3) one can never be certain the downloaded file will not be corrupted or contain viruses that could damage a user's computer. The music industry has also begun actively distributing decoy and corrupted files in order to discourage persons from downloading files illegally.<sup>17</sup> These problems provide significant headaches to prospective file swappers, which in turn create openings for inexpensive services such as those from Russia, that can offer a broad array of uncorrupted files and deliver them at a high rate of download speed.

Perhaps the greatest selling point these web sites have over the P2P networks is their claim of legality under Russian law.<sup>18</sup> The Supreme Court decision in *MGM Studios Inc. v. Grokster* against P2P software providers may actually drive more P2P users to the Russian web sites.<sup>19</sup> Some purchasers from these sites have bought into the idea that Russian law gives them the right to purchase the music, and they believe that the laws governing the transaction are Russian when they are transacting with a Russian business. Ultimately, this is willful blindness to the fact that we are governed by the laws of the state within which we live rather than the state with which we transact.<sup>20</sup>

One of the most basic principals of sovereignty is that a state has jurisdiction over the activities of those within its borders.<sup>21</sup> If a person's actions are illegal in the state where he is acting, it is simply irrelevant

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16. For a description of the rise and fall of several P2P networks, see Lior Jacob Strahilevitz, *Charismatic Code, Social Norms, and the Emergence of Cooperation on the File Swapping Networks*, 89 VA. L. REV. 505, 511-21 (2003).

17. See Hillary M. Kowalski, *Peer-to-Peer File Sharing & Technological Sabotage Tactics: No Legislation Required*, 8 MARQ. INTELL. PROP. L. REV. 297 (2004). Pop singer Madonna had her record label upload spoof tracks of her album "American Life" which were silent but for one track in which singer asked the downloader "What the f\*\*\* do you think you're doing?" Hackers soon struck back at her web site and the line was later sampled by other artists in their songs. David Hechler & Aaron Lauchheimers, *Paying to Play; Industry Spreads Subpoenas and Fear Over Music Copying*, NAT'L L.J., Aug. 11, 2003, at 1.

18. AllofMP3 and MP3Seach, *supra* note 2.

19. *MGM Studios Inc. v. Grokster, Ltd.*, 125 S. Ct. 2764 (2005). Jason Bracelin, *Overseas MP.3s: For Pennies a Tune, You Can Build a Primo Music Library and Support Free Enterprise in Russia*, CLEVELAND SCENE (OHIO), July 20, 2005.

20. See generally GOLDSMITH, *supra* note 3, at 31-70.

21. WILLIAM R. SLOMANSON, *FUNDAMENTAL PERSPECTIVES ON INTERNATIONAL LAW* 210-11 (Sharon Adams Poore ed., 3d ed. 2000).

whether his actions are legal in the state with which he is transacting. For example, if State X legalized child pornography, a U.S. citizen could not reasonably believe that downloading such materials from a web site run from State X was now legal in the United States.<sup>22</sup> As University of Miami Law School Professor Michael Froomkin told Cnet.com, "Just because you're using a computer doesn't mean you don't have to follow the law."<sup>23</sup> The only relevance Russian law might have to a U.S. user is for working out contractual disputes between herself and the web site, and for determining whether Russia might assert jurisdiction itself over that individual if Russia deemed the conduct to be illegal.

The first clause of Allofmp3's own liability limitations and rules agreement points out the fact that users are subject to the laws of their own country when it states: "You shall not download audio and video files from ALLOFMP3.com if the Terms are in conflict with the laws of your country of residence. ALLOFMP3.com shall not control actions of its users and the latter bear the sole responsibility for any illegal use."<sup>24</sup> The primary concern of downloaders and copyright holders must be their rights and obligations under their own domestic laws, and as such, this article will focus upon the implications under U.S. law rather than the legality of the distributor's actions under Russian law. As will be discussed later, the web site's obligations under Russian law are relevant to the copyright holders' ability to enforce their rights against downloaders, and ultimately the copyright holders may need to stop the distributors themselves in order to stop the downloading.

Given the tremendous bargain prices and lack of standard anti-piracy protections within the downloaded music files, it seems strange that anyone could believe these sites would pass legal muster. While the U.S. news media has largely ignored the emergence of these web music distributors, there have been a few news articles; but most have not been very helpful in pointing out the legal problems associated with these web sites. For example, a May 2004 article in the Washington Post referred to the legality of AllofMp3 as "murky,"<sup>25</sup> and EDN Magazine said the site was "legally

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22. See 18 U.S.C. § 2252A (2005) (prohibiting the receipt of child pornography from foreign sources, including by computer). See also *U.S. v. Thomas*, 74 F.3d 701, 709-710 (6th Cir. 1996) (holding that the download location was a proper venue for prosecution of charges related to distribution of obscene materials over the Internet).

23. Patricia Jacobus, *Taming the Web: Building fences, one by one*, CNET NEWS.COM, (Apr. 19, 2001), available at <news.com.com/2009-1023-255774-2.html?legacy=cnet>.

24. AllofMP3, *Liability Limitations and Rules of Allofmp3.com Services Use*, at <secure.allofmp3.com/reg/register.shtml?newaccount=on> (visited Feb. 5, 2005).

25. Leslie Walker, *Russian Site Peddles Music Megabyte*, THE WASH. POST, May 2,

and ethically questionable” in an October 2004 article.<sup>26</sup> The press outside the United States has been a little more interested in the problems associated with these web sites, but it has not always discouraged their use. After an article appeared in *The Sydney Morning Herald*, and was later picked up by Slashdot in the United States and *The Register* in the United Kingdom, AllofMp3’s servers apparently crashed for some time due to the influx of visits to its web site.<sup>27</sup> That article indicated that, at least in Australia, a downloader might escape liability through a claim of innocent infringement.<sup>28</sup>

### U.S. Copyright Law in the World Wide Web

Copyright laws seek to encourage the creation of original works by protecting the exclusive rights of persons who created those works. So important are the protections that the founding fathers of the United States even included them in the Constitution.<sup>29</sup> The core principles with regard to music (or phonorecords as it is referred to in the statute) is that an author of a work has the right to copy, distribute, prepare derivative works (such as translations and other versions of the original work), and perform the work publicly.<sup>30</sup> The authorship of a sound recording is divided between the person who recorded the song (the performer and/or producer) and the creator of the actual musical composition.<sup>31</sup> These authors may or may not be the same person or entity.<sup>32</sup> These exclusive rights normally stop at a state’s border, as copyright laws are territorially restricted unless a government can extend their protections through treaty agreements with other governments.<sup>33</sup>

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2004, at F7.

26. Brian Dipert, *How to Stop Worrying and Love Compressed Audio; the Ongoing Quest for the Perfect Portable-Audio System Holds Examples of Engineering Trade-offs or Designers of Similar Products*, EDN, Oct. 28, 2004, at 36.

27. See Charles Wright, *Going For A Song On The Net*, THE SYDNEY MORNING HERALD, May 4, 2004, at 5.

28. Charles Wright, *Russian Site Is Music to the Ears*, THE SYDNEY MORNING HERALD, Apr. 27, 2004, at 5.

29. U.S. CONST. art. I, § 8, cl. 8.

30. 17 U.S.C. § 106 (2005). See also Katherine Elizabeth Macdonald, *Speed Bump on the Information Superhighway: Slowing Transmission of Digital Works to Protect Copyright Owners*, 63 LA. L. REV. 411, 413-414 (2003).

31. 17 U.S.C. § 106. See also Ryan S. Henriquez, Note, *Facing the Music on the Internet: Identifying Divergent Strategies for Different Segments of the Music Industry in Approaching Digital Distribution*, 7 UCLA ENT. L. REV. 57, 69-70 (1999).

32. *Id.*

33. PAUL GOLDSTEIN, INTERNATIONAL COPYRIGHT: PRINCIPLES, LAW, AND PRACTICE 61 (2001).



With the advent of computer and Internet technology, the cost of copying and distributing protected content has dramatically decreased. In the past, mass infringement of protected content was often impractical for most persons because of the high cost of making quality copies and distributing them. When combined with the possibility of legal sanction, the average person would not bother with trying to copy and distribute songs to thousands of persons. Today, a person can electronically replicate a song or any other digitizable content, and then distribute the data around the world at tremendous speed and at little cost.<sup>34</sup> The relatively anonymous nature of Internet communication has aided these new copyright infringers, and the net result has been an arena where there are few impediments to the violation of copyright laws. The United States' legislative and court systems have begun to respond to the challenges of the Internet and the problems posed by such unauthorized distribution of copyrighted material. Congress enacted the No Electronic Theft (NET) Act in 1997, which modified the requirement for financial gain in criminal copyright violations,<sup>35</sup> and increased the penalties for such violations.<sup>36</sup> Before the NET Act, if a person violated a copyright with no intention of financial gain,<sup>37</sup> there could be no criminal sanction brought, although injunctive relief, impoundment and civil damages could still apply.<sup>38</sup> Now, if the copied material has a total retail value of more than \$1,000, the

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34. Strahilevitz, *supra* note 16, at 536-37. See also Raymond Shih Ray Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 U. CHI. L. REV. 263, 273-74 (2002) (noting the rise of P2P web sites corresponded to a decrease in the cost of copying CD's).

35. 17 U.S.C. § 506(a) states:

(1) Any person who infringes a copyright willfully shall be punished as provided under section 2319 of title 18, if the infringement was committed—

(A) for purposes of commercial advantage or private financial gain;

(B) by the reproduction or distribution, including by electronic means, during any 180-day period, of 1 or more copies or phonorecords of 1 or more copyrighted works, which have a total retail value of more than \$ 1,000

(C) by the distribution of a work being prepared for commercial distribution, by making it available on a computer network accessible to members of the public, if such person knew or should have known that the work was intended for commercial distribution.

36. No Electronic Theft (NET) Act of 1997, Pub. L. No. 105-147, 111 Stat. 2678 (codified in scattered sections of 17, 18 and 28 U.S.C.) (1997).

37. The NET Act was in response to cases such as *U.S. v. LaMacchia*, 871 F. Supp. 535 (D. Mass. 1994), where a college student avoided prosecution under 17 U.S.C. 506(a) because his sharing of copyrighted software was not for financial gain within the definition of the statute. Congress specifically changed the statute to now include such sharing of copyrighted material. No Electronic Theft (NET) Act, H.R. Rep. 105-339, §4 (Oct. 23, 1997).

38. 17 U.S.C. §§ 502-505 (2005).

violator could face criminal sanctions for willful violations.<sup>39</sup> In addition, the definition of financial gain now “includes receipt, or expectation of receipt, of anything of value, including the receipt of other copyrighted works.”<sup>40</sup> The combined effect of the NET Act was to include gratuitous file sharing networks within the scope of the criminal statute.

The Digital Millennium Copyright Act (DMCA)<sup>41</sup> implemented the World Intellectual Property Organization (WIPO) Copyright Treaty and the WIPO Performances and Phonograms Treaty, both signed in 1996.<sup>42</sup> Some of the major provisions of the DMCA are the prohibition on the manufacture or sale of devices that circumvent DRM’s; the prohibition of unauthorized access to works protected by DRM’s; and the granting of several protections to Internet Service Providers (ISP’s) from liability for piracy. ISP’s received limited liability when their conduct was limited to 1) transitory communications; 2) system caching; 3) storage of information on systems or networks at direction of users; and 4) information location tools.<sup>43</sup> In order to qualify for the limitations on liability, an ISP must take down infringing content when a notice is provided to it and it must block access to that content.<sup>44</sup> The DMCA also included a provision allowing a copyright holder to request a court to issue a subpoena to an ISP to identify persons who have infringed upon the copyright holder’s rights.<sup>45</sup> The D.C. Circuit recently held that a safe harbor provision in the DMCA limited the copyright holder’s ability to obtain such a subpoena when the ISP is acting as a transitory network of communication,<sup>46</sup> but it is yet uncertain if other federal courts will follow the decision.<sup>47</sup>

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39. Ronnie Heather Brandes, Bonnie L. Kane & Kelly A. Librera, *Intellectual Property Crimes*, 37 AM. CRIM. L. REV. 657, 675 (2000).

40. 17 U.S.C. § 101 (2005).

41. Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860 (codified in scattered sections of 5, 17, 18, 28 and 35 U.S.C.) (1998).

42. U.S. Copyright Office, *The Digital Millennium Copyright Act of 1998 U.S. Copyright Office Summary*, available at <[www.copyright.gov/legislation/dmca.pdf](http://www.copyright.gov/legislation/dmca.pdf)>.

43. *Id.*

44. John Kennedy, Mary Rasenberger & M. Lorrane Ford, 1 Internet Law and Practice, *Notice and Take-Down Provisions* § 12:38 (2004).

45. 17 U.S.C. § 512(h) (2005).

46. Recording Indus. Ass’n of America, Inc. v. Verizon Internet Services, Inc., 351 F.3d 1229, 1234-36 (D.C. Cir. 2003) *cert. denied* 160 L. Ed. 2d 222, 125 S. Ct. 347, 2004 U.S. LEXIS 6701 (2004).

47. A recent Northern District of Texas district court noted that it was not bound by the decision in *Verizon* when it refused to grant a motion for remand in a lawsuit against an ISP that divulged information about a customer to the RIAA. *Garrett v. Comcast Communications, Inc.*, 2004 U.S. Dist. LEXIS 14218 n. 1 (N.D. Tex. 2004) (involving a law suit against an ISP which did divulge personal information to the recording industry, and

## Penalties after the NET Act

Copyright law is enforced through both civil and criminal sanctions. The possible criminal sanctions for infringing upon a copyright will vary with the downloader's intended uses of the material. If a song is willfully downloaded with the intent of further sale or for trade for other copyrighted works,<sup>48</sup> then the action may be a criminal infringement under 17 U.S.C. § 506(a)(1) because the download was for "financial gain." This infringement for financial gain could lead to a prison sentence of up to five years for the "reproduction or distribution, *including by electronic means*, during any 180-day period, of at least 10 copies or phonorecords, of 1 or more copyrighted works, which have a total retail value of more than \$2,500" (emphasis added).<sup>49</sup> Subsequent offenses can result in fines and imprisonment for up to ten years.<sup>50</sup> If the person downloads nine or fewer phonorecords with a total retail value of less than \$2,500 with a motive of financial gain, then she could be imprisoned for up to one year.<sup>51</sup>

If the downloading is not for financial gain, then the criminal sanctions are less severe. For the first offense of "reproduction or distribution of 10 or more copies or phonorecords of 1 or more copyrighted works, which have a total retail value of \$2,500 or more," the downloader may receive a fine and up to a three year prison sentence.<sup>52</sup> Subsequent prosecution for the offense will yield fines and sentences of not more than six years.<sup>53</sup> Finally, if the reproduced or distributed work has a combined value of between \$1,000 and \$2,500, then the person may be fined and receive up to one year in prison.<sup>54</sup>

If a person is found to be criminally liable for a copyright violation, it is likely that she will also be civilly liable, given that the burden of proof in a civil trial is only a preponderance of the evidence and the willfulness requirement is not applicable.<sup>55</sup> If found civilly liable, a downloader may be forced to pay for the actual damages caused to the copyright holder plus

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though not deciding the issue, the court noted that it is not bound to follow the decision in *Verizon*).

48. 17 U.S.C. § 101 (2005).

49. 18 U.S.C. § 2319(b)(1) (2005).

50. *Id.* § 2319(b)(2).

51. *Id.* § 2319(b)(3).

52. *Id.* § 2319(c)(1).

53. *Id.* § 2319(c)(2).

54. *Id.* § 2319(c)(3).

55. 15 MELVILLE B. NIMMER & DAVID NIMMER, *Criminal Infringement of Copyright*, in NIMMER ON COPYRIGHT § 15.01 [A](2) (2005).

any profit the defendant may have made by the infringement,<sup>56</sup> or the copyright holder may opt for statutory damages<sup>57</sup> of up to \$150,000.<sup>58</sup> The copyright holder may also be entitled to recover his or her reasonable costs and attorney fees associated with bringing the lawsuit,<sup>59</sup> impounding of the copyrighted material<sup>60</sup> and an injunction to prevent further infringement by the person found liable.<sup>61</sup>

### **Is Downloading From Abroad Importation or Copying?**

A copyright holder's right to control the copying and distribution of his works is not an unlimited right, and there are specific limits on a holder's ability to prevent importation of his works from other countries. Section 602(a) of the Copyright Act provides a general prohibition on the importation of copies or phonorecords without the permission of the copyright holder; however, section 602(a)(2) contains an exception for the importation of a single copy or phonorecord of any one work at any one time.<sup>62</sup> This exception allows a person to bring a CD into the United States for personal use without fear of violating copyright law, even if the CD was created in violation of the copyright holder's rights. Many persons on the Internet have noted the exception and used it as a justification for the purchase of single copies of songs from the Russian web sites, regardless of the lack of copyright holder's authorization given to the web sites.<sup>63</sup> The belief is that the purchase of the song over the Internet is akin to the purchase of a CD in the real world.

While this reasoning has a certain appeal, it ignores the fact that an electronic signal would not be considered an imported "copy" or "phonorecord" under U.S. copyright law.<sup>64</sup> In order to infringe upon a

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56. 17 U.S.C. § 504(b) (2005).

57. A plaintiff may choose statutory damages when actual damages are insufficient or difficult to prove. *Id.* § 504(c)(1).

58. 17 U.S.C. § 504(c) (2005).

59. *Id.* § 505.

60. *Id.* § 503. The computers in which the files are stored may be returned to the user after the infringing material has been removed. See *Religious Tech. Ctr. v. F.A.C.T. NET, Inc.*, 907 F. Supp. 1468, 1471-72 (D. Colo. 1995).

61. 17 U.S.C. § 502 (2005).

62. *Id.* § 602(a).

63. See MuSeekster.com, *AllofMP3 FAQ*, at <[www.museekster.com/allofmp3faq.html](http://www.museekster.com/allofmp3faq.html)> (visited Feb. 5, 2005); Fadmine.com, *AllofMP3 is Legal - And Cheap to Boot*, at <[fadmine.com/allofmp3-legal-cheap-mp3s.html](http://fadmine.com/allofmp3-legal-cheap-mp3s.html)> (visited Feb. 5, 2005); Fat Wallet, *Discussion Forum*, at <[www.fatwallet.com/forums/arcmessageview.cfm?catid=18&threadid=259565](http://www.fatwallet.com/forums/arcmessageview.cfm?catid=18&threadid=259565)> (visited Feb. 5, 2005).

64. The Clinton Administration did suggest Congress broaden the definition of

copyright holder's exclusive right of importation<sup>65</sup> and to fit within the exception for personal importation,<sup>66</sup> the purchased item must be either a copy or a phonorecord.<sup>67</sup> As the electronic signals are primarily for communicating audio information, the closest match would be to phonorecords, rather than copies. Phonorecords are defined as:

[M]aterial objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.<sup>68</sup>

Downloads are electronic signals, and therefore are a form of energy. A physicist might consider matter and energy to be related states of being, but a more common understanding of materiality would only include matter and thus would exclude electronic signals.<sup>69</sup> Briefly stated, because these sorts of electronic communications are not material items, they do not fit within the definition of importation of phonorecords, and therefore the exception for the importation of phonorecords for personal use is inapplicable.

When a user purchases a song from web sites, what that user actually purchases is a signal that contains information that may be recorded onto the user's computer. It is at the moment of recording of that information that the signal becomes a material object and thus a phonorecord is born under the provisions of U.S. copyright law. That phonorecord was not imported into the United States; it was created in the United States on the

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importation to include electronic transmissions. Information Infrastructure Task Force, Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights, app. 2, at 3 (Sept. 1995) available at <[www.uspto.gov/web/offices/com/doc/ipnii/](http://www.uspto.gov/web/offices/com/doc/ipnii/)> (hereinafter White Paper). Congress did not adopt the suggested changes. If Congress had broadened the definition of importation, the exception may have applied. However, the downloader may still have been infringing upon the copyright holder's rights by making an illegal copy of the phonorecord as I will argue.

65. 17 U.S.C. § 602(a) (2005).

66. *Id.* at § 602(a)(2). While importation was not specifically defined in the statute, it is defined as "the act of bringing goods and merchandise into a country from a foreign country." BLACK'S LAW DICTIONARY 755 (6th ed. 1990). See *Enesco Corp. v. Jan Bell Marketing Inc.*, 992 F. Supp. 1021, 1023 (E.D. Ill. 1998).

67. 17 U.S.C. § 602 (2005)

68. *Id.* § 101 (emphasis added).

69. The definition of copies also does not encompass these purchased files, as copies are defined in the statute as "material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." *Id.*

user's computer. That moment of creation is the moment when the user violates the copyright law because the newly created phonorecord is not an authorized reproduction by the copyright holder.<sup>70</sup> The user does not violate U.S. law by purchasing or even receiving an electronic signal from Russia; but rather the violation occurs when the signal is recorded onto the user's computer.<sup>71</sup> By analogy, downloading the file would be similar to listening to music from a foreign radio station. Hearing the music would not be a form of importation, but if the listener recorded the music, then the listener would be in violation of copyright law.<sup>72</sup>

### Fair Use Doctrine

Using a computer to copy a file from an electronic signal broadcast over the Internet could be seen as similar to copying a television program onto videotape. While copyright holders have a general right to control the

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70. "It is understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 (*Right of Reproduction*) of the Berne Convention" (emphasis added). WIPO, *Agreed Statements concerning the WIPO Copyright Treaty, Concerning Article 1(4)*, (Dec. 20, 1996), available at <[www.wipo.int/treaties/en/ip/wct/statements.html](http://www.wipo.int/treaties/en/ip/wct/statements.html)>. See also *MAI Systems Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 518 (9th Cir. 1993) (supporting a district court conclusion that "the loading of copyrighted computer software from a storage medium [hard disk, floppy disk, or read only memory] into the memory of a central processing unit ["CPU"] causes a copy to be made. In the absence of ownership of the copyright or express permission by license, such acts constitute copyright infringement."); *Intellectual Reserve v. Utah Lighthouse Ministry*, 75 F. Supp. 2d 1290, 1294 (D. Utah 1999) (holding that "when a person browses a website, and by so doing displays a handbook, a copy of the handbook is made in the computer's random access memory [RAM] in order to permit viewing of the material. In making a copy on the user's computer, even a temporary one, the person who browsed thereby infringes the copyright."). The U.S. copyright holders do not authorize the signals sent from Russia, and the copyright holders receive few if any royalties for the signals. See *infra* pp. 122-23.

71. The first sale doctrine also limits a copyright holder's exclusive right of importation. 17 U.S.C. § 109(a) (2005). See also *Quality King Distrib. v. Lanza Research Int'l* 523 U.S. 135 (1998); 8 MELVILLE B. NIMMER & DAVID NIMMER, *The Nature of the Rights Protected by Copyright*, in NIMMER ON COPYRIGHT, § 8.12[B](4) (2005). Briefly stated, the first sale doctrine allows the owner of a particular, lawfully made copy or phonorecord to sell or dispose of that copy or phonorecord without the consent of the copyright holder. 17 U.S.C. § 109(a) (2005). This doctrine is inapplicable in this instance because there is no first sale of a particular copy and later distribution. Rather the phonorecords are created illegally on the downloader's hard drive by copying the signal sent from abroad. Whether the Russian web sites validly purchased a copy of the phonorecord in question is irrelevant because the web sites are not transferring that phonorecord. They are broadcasting signals on demand to users that may be copied.

72. The fair use doctrine would likely apply in this analogy, and the next section will examine the application of this doctrine.

reproduction of their work,<sup>73</sup> “[a]ll reproductions of the work, however, are not within the exclusive domain of the copyright owner; some are in the public domain.”<sup>74</sup> In *Sony Corp. of America v. Universal City Studios, Inc.*, the Supreme Court held that private videotaping of television programs was a “fair use” of copyrighted material because the public had a valid interest in being able to “time-shift” their viewing times.<sup>75</sup> The Court evaluated the fair use doctrine under an “equitable rule of reason” and stated that such time-shifting might provide a benefit to the public by “increasing public access to freely broadcast television programs,”<sup>76</sup> and supported the district court finding that the copyright holder might receive some benefit from the time-shifting because the shifting effectively increases the size of the viewing audience.<sup>77</sup>

Given the difference between the nature of videotaping a freely televised program and the unauthorized download of a copyrighted song, it is unlikely that any court would accept that the creation of a copy of that song on the user’s hard drive would fit within the fair use doctrine. Congress has created a non-definitive list of items that a court should look to when making a fair use determination that includes:

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.<sup>78</sup>

When narrowly viewed, the character of use of the download would likely not be viewed as commercial in nature unless the users did so for financial gain (which includes intent to exchange).<sup>79</sup> Therefore, the first factor would tend to cut in favor of fair use if the user does not intend to sell or exchange the downloaded song. However, this copying takes on a greater commercial nature when viewed with the fourth factor, which weighs the effect the use will have upon the “potential market for or value of the copyrighted work.”<sup>80</sup> The downloading affects the commercial

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73. 17 U.S.C. § 106(1) (2005).

74. *Sony Corp. of America v. Universal City Studios, Inc.* 464 U.S. 417, 433 (1985).

75. *Id.* at 442-55.

76. *Id.* at 454.

77. *Id.* at 453-54.

78. 17 U.S.C. § 107 (2005).

79. *Id.* § 101.

80. *Id.* § 107(4). The Supreme Court has noted in balancing the statutory factors considered in a fair use determination that “[t]his factor is undoubtedly the single most

possibilities for the copyright holder by reducing the number of potential purchasers of music. Foreign Internet distributors compete with the copyright holder's ability to exploit her temporary legal monopoly and in doing so the copyright holder's market and pricing ability suffers from the unfair competition from abroad.<sup>81</sup>

The Court in *Sony* noted that a television program is supported by the broadcaster's ability to sell advertising spots within the program, and that few persons actually skip the commercials when videotaping of a program occurs.<sup>82</sup> The Court reasoned that videotaping would lead to minimal harm to the broadcasters, and that the taping might even increase viewing audience size because more viewers could view the programs if they were able to view them at a time of their own choosing.<sup>83</sup> The increased audience size would increase the value of the broadcaster's advertising spots, and thus the time-shifting capability of videotaping would benefit the broadcasters as well as the public.<sup>84</sup> The downloading of music does not provide a comparable compensation to the music producer because a producer depends upon music sales to generate income. As will be discussed below, producers and performers may receive some royalties from Russian management organizations; however, they have little control over the amount of royalties and the process of collecting the royalties.<sup>85</sup> Performing artists might benefit from a wider distribution of their recording because this might encourage more persons to attend their performances,

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important element of fair use." *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 566 (1985). See also *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 913 (N.D. Cal. 2000) (holding that "[e]ven after *Sony*, wholesale copying for private home use tips the fair use analysis in plaintiffs' favor if such copying is likely to adversely affect the market for the copyrighted material").

81. The fact that something is for personal use does not mean that it is not commercial in nature when it competes with commercial products. The famous Commerce Clause case of *Wickard v. Filburn*, 317 U.S. 111 (1942), held that even the personal consumption of home-grown wheat was commercial in nature because of the aggregate effect that such consumption would have upon the market for wheat. Even more than the home growing of wheat, the aggregate effect of unauthorized copying of music will have a detrimental effect on the market for music.

82. *Sony*, 464 U.S. at 452-54.

83. *Id.*

84. *Id.* With the increasing availability of television recorders to eliminate those advertisements, the time may be coming when the Court may need to revisit this decision in light of the new technology. See Maribel Rose Hilo, *TIVO and the Incentive/Dissemination Conflict: The Economics of Extending Betamax to Personal Video Recorders*, 81 WASH. U. L. Q. 1043 (2003), and Rina Dolmayan, *The Fair Use Doctrine: How Does it Apply to New Technology that May Impinge on Financial Interests of the Copyright Owners?*, 4 J. LEGAL ADVOC. AND PRAC. 186 (2002).

85. See *infra* pp. 288-89.



but as stated earlier, the copyright holder is generally the producer of the recording. If a copyright holder is unable to exploit her monopoly power, then she will be less likely to create new content (recordings) and everyone will be harmed by a decrease in the amount of creative content available. Allowing illegal downloads would not be "fair" to the copyright holder, or the public as a whole. As such, as a society we should not consider downloading music from unauthorized foreign web sites to be fair use.

The nature and portion of the material copied both cut against justification under the fair use doctrine as well. Copying of factually based works is more likely to be found to be a fair use than copying of imaginative works.<sup>86</sup> In addition, the copying of only a part of a work rather than the whole may also increase the likelihood a court will view the use as fair.<sup>87</sup> An artistic work, such as a song, is by definition more creative than factual in nature, and when a user downloads a song, he is not merely sampling the work, but rather copying it in its entirety. When taken as a whole, the factors listed in the fair use statute seem to cut against considering copying music from an Internet distributor as fair use. As fair use is an equitable doctrine, the court must balance interests involved in making the copy.<sup>88</sup> It is hard to imagine that any court would favor a downloader's interest in maintaining questionably purchased music files from abroad over a copyright holder's interest in maintaining her statutorily granted monopoly.

### **Innocent Infringement**

Another possible defense a downloader might raise is innocent infringement. Suppose a person honestly believed that he was not infringing upon the copyright holder's rights either because he assumed the purchase was governed by Russian law or fit within a loophole in the U.S. copyright law. This might not even be an unreasonable position given the ambiguous information regarding the legality of the sites. For example, when an Australian newspaper quoted a barrister who stated that innocent infringement might be a valid defense for downloaders from these sites, other news services in the United States and United Kingdom soon picked up the story.<sup>89</sup> Internet users in the United State were soon claiming that

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86. 13 MELVILLE B. NIMMER & DAVID NIMMER, *The Defense of Fair Use*, in NIMMER ON COPYRIGHT § 13.05 [A](2) (2005).

87. *Id.*

88. *Sony*, 464 U.S. at 454-55.

89. Wright, *supra* note 28, at 5.

they too might be able to use this defense.<sup>90</sup> Unfortunately for any downloader in the United States, the legal advice of an Australian barrister is of little use in a U.S. criminal court.

If a court finds a downloader did not have the intent to violate the copyright holder's rights because of some mistake of fact, then the defense of innocent infringement may be of some use in avoiding criminal liability. Willfulness is one of the elements that the government must show when bringing a charge of criminal copyright infringement.<sup>91</sup> Before the NET Act, some courts defined willfulness as only having intent to copy the work in question,<sup>92</sup> while others required a "voluntary, intentional violation of a known legal duty."<sup>93</sup> After the passage of the NET Act, Congress seems to have favored the latter definition of willfulness. The Act amended section 506(a) by adding: "For purposes of this subsection, evidence of reproduction or distribution of a copyrighted work, by itself, shall not be sufficient to establish willful infringement."<sup>94</sup> As with most criminal statutes, however, a good faith belief in the legality of the copying may not be sufficient to avoid criminal liability.<sup>95</sup> Normally, the willfulness requirement will only be an effective defense to a criminal action when the defendant did not know he was violating a copyright through a mistake of knowledge of the facts of the situation (such as an erroneous belief that the song in question was an imitation) rather than a mistake of a point of law.<sup>96</sup> Fair use may provide a defense for some claims (even if the defendant ultimately loses),<sup>97</sup> but as previously stated, a fair use claim for this sort of copying of an electronic signal from abroad would likely be viewed as weak at best. Thus, whatever defense the law of Australia may provide its

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90. See MuSeekster.com, FadMine.com, Fat Wallet, *supra* note 63.

91. 17 U.S.C. § 506(a) (2005). See also NIMMER, *supra* note 55, § 15.01.

92. United States v. Backer, 134 F.2d 533, 535 (2d Cir. 1943); United States v. Taxe, 380 F. Supp. 1010, 1017 (C.D. Cal. 1974), *aff'd*, 540 F.2d 961 (9th Cir. 1976), *cited in* NIMMER, *supra* note 55, § 15.01.

93. United States v. Moran, 757 F. Supp. 1046, 1049 (D. Neb. 1991).

94. 17 U.S.C. § 506(a) (2005).

95. Representative Cole noted,

The government should not be required to prove that the defendant was familiar with the criminal copyright statute or violated it intentionally. Particularly in cases of clear infringement, the willfulness standard should be satisfied if there is adequate proof that the defendant acted with reckless disregard of the rights of the copyright holder. In such circumstances, a proclaimed ignorance of the law should not allow the infringer to escape conviction.

Statement of Rep. Howard Cole of North Carolina. 143 Cong. Rec. H9883 (daily ed. Nov. 4, 1997).

96. NIMMER, *supra* note 55, § 15.01 [A](2).

97. *Id.*

citizens for claims of innocent infringement, the United States does not appear to provide a similar protection to its citizens.<sup>98</sup>

Concerning civil sanctions, the ability to claim innocent infringement is even weaker. Copyright infringement is generally considered to be a strict liability tort,<sup>99</sup> where a plaintiff must only show that she had a valid copyright and that the defendant in question infringed upon that right. A defendant's intent to infringe upon a copyright may have an impact upon the level of statutory damages the defendant may suffer. If a plaintiff opts for statutory damages, there are three ranges of damages available depending upon the intent of the defendant: 1) willful infringement, 2) knowing infringement, and 3) innocent infringement.<sup>100</sup> A willful infringement occurs when a plaintiff sustains the burden of showing that the defendant was aware of the copyright and intentionally violated that copyright.<sup>101</sup> The determination of willfulness and the level of statutory damages is a matter for the jury when the defendant has opted for a jury trial, as required by the Seventh Amendment.<sup>102</sup> Damages for such a willful infringement may range from \$750 to \$150,000.<sup>103</sup> The line between knowing and willful infringement is somewhat unclear because a knowing infringement involves the knowing infringement of a copyright as well. The difference appears to be most relevant when there is some subjective reason for the defendant to believe the actions were not infringement, such as faulty legal advice from an attorney.<sup>104</sup> Even in this case, however, a defendant must have developed the faulty understanding of copyright law before the infringement takes place.<sup>105</sup> The damages in this area of infringement may range from \$750 to \$30,000.<sup>106</sup> If a defendant is able to show that she did not know in good faith that her actions were an infringement and that this belief was reasonable (though ultimately incorrect), the defendant may then claim to be an innocent infringer.<sup>107</sup> An innocent infringer may have his or her statutory damages

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98. See White Paper, *supra* note 64, 100-101.

99. H.R. REP. NO. 105-339, at 24 (1997) citing U.S. DEP'T. OF JUSTICE, *Federal Prosecution of Violations of Intellectual Property Rights* (1997), at 24.

100. 14 MELVILLE B. NIMMER & DAVID NIMMER, *Statutory Damages*, in NIMMER ON COPYRIGHT § 14.04 [B](1)(a) (2005).

101. *Id.* § 14.04 [B](3) (2005).

102. U.S. CONST. amend. VII. *Feltner v. Columbia Pictures TV*, 523 U.S. 340, 355 (1998).

103. 17 U.S.C. § 504(c) (2005).

104. NIMMER, *supra* note 100, § 14.04[B](3).

105. See *Int'l Korwin Corp. v. Kowalczyk*, 855 F.2d 375, 382 (7th Cir. 1988).

106. 17 U.S.C. § 504(c)(1) (2005).

107. NIMMER, *supra* note 100, § 14.04[B](2)(a).

reduced to a minimum of \$200.<sup>108</sup> Given that defendants will often claim innocence on their part, and plaintiffs will claim willfulness on the defendants' part, most courts default to the knowing range of statutory damages.<sup>109</sup> If a defendant commits multiple acts of infringement (i.e. downloads multiple songs), the defendant may be liable for statutory damages for each act of infringement.<sup>110</sup>

Because a person might have a good faith belief that her actions were within an exception to the law, it would seem too punitive to impose the full willful damage range upon such a user. The courts should preserve the willful violation sanction for a person who trades files on clearly illegal P2P web sites. On the other hand, it is too much of a stretch of the definition of innocence to hold that these are innocent downloads. A reasonable person could not look at a web site promising to charge 1/20th the price for music and offer that music without copyright protection, and still believe the site passed the smell test for legality. In the end, statutory damages for each downloaded file should fall within the knowing range. Damages of \$750 to \$30,000 per infringement will provide the copyright holders with a reasonable recovery for their harm, and the damages will discourage other downloaders from continuing to download from these Russian web sites.

### Enforcement against the Web Sites

The anonymity of Internet commerce and international borders may provide a formidable challenge to the copyright holders' abilities to enforce their rights. This anonymity has been a mixed blessing for the free flow of information. At best, it has allowed more people to share their ideas and information with a wider audience than would have ever been possible using traditional means. At worst, the Internet has become an invitation to copyright infringement and other crimes that have raged across the Internet. With the advent of MP3 compression technology, users have taken advantage of this perceived anonymity to buy, sell and trade music with few consequences. The music industry has had some success by filing lawsuits against file sharing networks<sup>111</sup> and against those individuals sharing files.<sup>112</sup>

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108. 17 U.S.C. § 504(c)(2) (2005); NIMMER, *supra* note 100, § 14.04[B](2)(a).

109. NIMMER, *supra* note 100, § 14.04[B](1)(a).

110. *Id.* § 14.04[E](1). See also *Rodgers v. Eighty-Four Lumber Co.*, 623 F. Supp. 889 (W.D. Pa. 1985).

111. See EINHORN, *supra* note 13, at 84-91.

112. Amy Harmon, *Subpoenas Sent to File-Sharers Prompt Anger and Remorse*, N.Y.

As with Napster,<sup>113</sup> Kazaa,<sup>114</sup> BitTorrent<sup>115</sup> and other file downloading networks such as Puredunes.com,<sup>116</sup> the copyright holders will likely first seek to shut down the Russian web sites rather than going after the users. The copyright holders will do this for reasons of efficiency and to avoid the public relations problems associated with previous lawsuits against users.<sup>117</sup> While useful in the short run, it would be a mistake to assume that a clampdown in Russia alone can solve the problem. Much as P2P networks have fled from enforcement by moving across borders,<sup>118</sup> these providers would likely flee Russia at the first sign of a crackdown, and if they do, other international entrepreneurs will quickly replace them. In the end, enforcement at the source could become something like an international whack-a-mole game.<sup>119</sup>

If the copyright holders choose to bring their lawsuits against the Russian web sites in the United States, there is some reason to believe that the federal courts will accept jurisdiction over the matter and apply U.S. copyright law even though copyright law normally stops at a state's border.<sup>120</sup> Although Kazaa (a P2P file sharing network whose software is now controlled and defended by Sharman Networks) won a victory at the Ninth Circuit Court of Appeals,<sup>121</sup> it lost at the Supreme Court<sup>122</sup> and failed to avoid a Los Angeles federal court's assertion of personal jurisdiction.<sup>123</sup>

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TIMES, July 28, 2003, at C1.

113. EINHORN, *supra* note 13, at 84-88.

114. *Id.* at 88-91.

115. See John Borland, *BitTorrent File-swapping Networks Face Crisis*, CNET NEWS.COM (Oct. 25, 2004), available at <news.com.com/BitTorrent+file-swapping+networks+face+crisis/2100-1025\_3-5498326.html?tag=st.rc.targ\_mb>.

116. See John Borland, *MP3 Site Settles for \$10 Million with RIAA*, CNET NEWS.COM (Dec. 20, 2004), available at <news.com.com/MP3+site+settles+for+10+million+with+RIAA/2100-1027\_3-5425885.html>.

117. See John Schwartz, *Record Industry Warns 204 Before Suing On Swapping*, N.Y. TIMES, Oct. 18, 2003, at C1; John Naughton, *If You Want to See the Future, It's Time to Consult Your Peers*, THE OBSERVER, (Oct. 10, 2004), available at <observer.guardian.co.uk/business/story/0,6903,1323688,00.html>.

118. Kazaa unsuccessfully sought to evade U.S. law enforcement by moving their place of incorporation to Vanuatu, a Pacific island nation. Declan McCullagh, *Judge: Kazaa Can be Sued in U.S.*, CNET NEWS.COM (Jan. 10, 2003), available at <news.com.com/Judge+Kazaa+can+be+sued+in+U.S./2100-1023\_3-980274.html>.

119. Maney, *supra* note 12, at 10B.

120. DAVID J. MOSER, MUSIC COPYRIGHT FOR THE NEW MILLENNIUM 147 (Patrick Runkle ed., ProMusic Press 2002).

121. MGM Studios, Inc. v. Grokster, Ltd., 380 F.3d 1154 (9th Cir. 2004).

122. *Grokster*, 125 S. Ct. 2764.

123. Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 243 F. Supp. 2d 1073, 1080 (C.D. Cal. 2003).

Despite its place of incorporation in the island nation of Vanuatu and principal place of business in Australia,<sup>124</sup> Sharman was subject to U.S. personal jurisdiction because it had “knowingly and purposefully availed itself of the privilege of doing business in California.”<sup>125</sup> Further, the court noted that copyright law can be applied extraterritorially when the foreign defendant’s “acts aid, induce or contribute to copyright infringement by another within the United States.”<sup>126</sup> For this reason, the Russian web sites may face contributory or vicarious liability for aiding copyright infringement by its U.S. users. By sending electronic signals into the United States, the web sites may also be directly violating copyright holders’ exclusive rights of distribution, performance, and importation.<sup>127</sup>

Even if a U.S. civil plaintiff can get a judgment against the Russian web sites in a U.S. court, the plaintiff may be unable to have its judgment enforced if the web sites do not have any assets inside of the United States. Neither the United States nor the Russian Federation is a party to the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters,<sup>128</sup> and they do not have any bilateral agreements for the enforcement of civil judgments.<sup>129</sup> The United States and the Russian Federation do have an agreement providing for assistance in criminal matters;<sup>130</sup> however, the treaty limits assistance to when “the conduct in connection with which the request is received would not constitute an offense under the laws of the Requested State.”<sup>131</sup> Therefore, if the actions of the web sites were legal under Russian law, the Russian

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124. *See id.*

125. *Id.* At 1087.

126. *Id.* at 1097, *citing* *Armstrong v. Virgin Records, Ltd.*, 91 F. Supp. 2d 628, 635-36 (S.D.N.Y. 2000).

127. 17 U.S.C. §§ 106(1), (3)-(6), 602(a) (2005). *See also* *T.B. Harms Co. v. Jem Records, Inc.*, 655 F. Supp. 1575 (D.N.J. 1987); *Parfums Givenchy, Inc. v. C&C Beauty Sales, Inc.*, 832 F. Supp. 1378 (C.D. Cal. 1993). The Report of the Working Group on Intellectual Property Rights in 1995 argued that transmitting a copy of a phonorecord across state borders over the Internet may not constitute importation or distribution under current U.S. Copyright Laws. White Paper, *supra* note 64, at 107-109. The White Paper recommended Congress amend U.S. Copyright law to clarify that such transmissions were distributions and importations. *Id.* at 211-221. Congress did not make the suggested changes.

128. Hague Conference On Private International Law, *Member States*, available at <hcch.e-vision.nl/index\_en.php?act=states.listing>.

129. U.S. Dept. of State, *Treaties in Forces*, available at <www.state.gov/www/global/legal\_affairs/tif\_01c.pdf>.

130. Agreement between the Government of the United States of America and the Government of the Russian Federation on Cooperation in Criminal Law Matters, June 30, 1995, T.I.A.S. No. 12674.

131. *Id.* at art. 3.

government would not be obligated by the treaty to assist the U.S. government's efforts to enforce its criminal copyright law.

The next step in the process must therefore be an examination of Russian copyright law to determine the enforceability of U.S. copyright law in Russia.<sup>132</sup> A U.S. civil copyright holder may also attempt to enforce her rights in the Russian court system using Russian law. Russian copyright law does provide protections for musical works,<sup>133</sup> and also protects producers and performers of phonorecords.<sup>134</sup> However, the law also provides compulsory licenses to wire broadcasters of phonorecords if certain conditions are met.<sup>135</sup> The law requires the broadcasters to collect royalties and pay them to management organizations such as the previously mentioned RMIS or ROMS.<sup>136</sup> These groups are organized under Russian law and are supposed to manage copyright holders' rights on a collective basis.<sup>137</sup> The management organizations have the right to grant licenses to the broadcasters even in the absence of an agreement with the actual copyright holders, whether the holders are Russian or foreign.<sup>138</sup> The amount of royalties collected is determined by an agreement between the broadcasters (the web site distributors), and the management organizations, or by a "specially authorized agency of Russia" in the absence of an agreement.<sup>139</sup> The management organizations must pay the royalties to both the producers and performers of the phonogram, but no mention is made of the music composers.<sup>140</sup> Nor does it appear that producers and

132. See Law Federation No. 5351-1 of July 9, 1993 on Copyright and Neighbouring Rights, *Vedomosti Syezda Narodnikh Deputatov Rossiyskoy Federatsii I Verkhovnogo Soveta Rossiyskoy Federatsii* [Ved. RF] [Bulletin of the Congress of People's Deputies of the Russian Federation and Supreme Council of the Russian Federation] 1993, No. 32, Art. 1242; *Sobranie Zakonodatelstva Rossiyskoy Federatsii* [SZ RF] [Russian Federation Collection of Legislation], 1995, No. 30, Art. 2866 (hereinafter Russian Copyright Law). Translation available from Garant-Service, document no. 10001423.

133. *Id.* at art. 7.

134. *Id.* at art. 37, 38.

135. *Id.* at art. 39(1). See also *Лазейка для правосудия* [Loophole for Justice], КОМПАНИЯ, (Mar. 14, 2005) available at <[www.ko.ru/document.asp?d\\_no=11439&p=1](http://www.ko.ru/document.asp?d_no=11439&p=1)>.

136. *Id.* at art. 39(2)

137. *Id.* at 44-47.

138. *Id.* at art. 45(2),(3). See also United States Embassy, Moscow, Russia, *Copyright*, at <[www.usembassy.ru/bilateral/bilateral.php?record\\_id=ipr\\_copyright](http://www.usembassy.ru/bilateral/bilateral.php?record_id=ipr_copyright)> (visited Dec. 20, 2005); Russian Organization For Multimedia and Digital Systems, *Copyright Holders*, at <[www.roms.ru/?fms=2](http://www.roms.ru/?fms=2)> (visited Dec. 20, 2005).

139. *Id.* at art. 39(3).

140. *Id.* at art. 39(2). A phonogram producer is defined as "the natural person or legal entity that has taken the initiative of and responsibility for the first recording of the sounds of a performance or of other sounds; in the absence of proof to the contrary, the natural person or legal entity named in the customary manner on the phonogram or on the sleeve or

performers have any right to demand higher royalties or block the use of their songs.

While the web sites claim to operate under these Russian compulsory licenses and pay the management organizations, the validity of these compulsory licenses and payments are uncertain.<sup>141</sup> The International Federation of the Phonographic Industry (IFPI) disputes the license for at least Allofmp3,<sup>142</sup> and likely the other web sites as well. IFPI Moscow Regional Director Igor Pozhitkov stated, "We have consistently said that Allofmp3.com is not licensed to distribute our members' repertoire in Russia or anywhere else."<sup>143</sup> Other IFPI personnel have been less certain about copyright holders' rights under current Russian Law.<sup>144</sup> Vladimir Dragunov, IFPI Russian Legal Advisor, told an online magazine that "[b]ecause of these loopholes we don't have much chance of succeeding if we attack these companies who are using music files on the Internet under current Russian laws."<sup>145</sup>

The Russian Duma amended Russia's Copyright Law in July 2004 to provide greater protections for copyright holders, but many of the important revisions will not go into effect until September 1, 2006.<sup>146</sup> The provision that will go into effect in September clarifies that producers and performers have an exclusive right to make phonorecords available to the

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inlay card thereof shall be considered the producer of the phonogram." *Id.* at art. 4(8). A performer is defined as "the actor, singer, musician, dancer or any other person who performs, recites, declaims, sings, plays on a musical instrument or in any other way presents a literary or artistic work (including a variety turn, circus act or puppet show), and also the producer or director of a show and the orchestra conductor. *Id.* at art. 4(10).

141. AllofMP3 and MP3Search, *supra* note 2. Konstantin Leontiev, deputy director general for legal issues of ROMS, said in an e-mail statement to the Wall Street Journal that the ROMS acts "in conformity with the requirements of the Russian laws." Mr. Leontiev did not comment on users outside Russia other than to say they should consult their local laws. Vauhini Vara, *Russian Sites Sell Song Downloads For Pennies, But Are They Legal?*, WALL ST. J. ONLINE, Jan. 25, 2005 at <online.wsj.com/article/0,,SB110632225796232623,00.html> (visited Dec. 20, 2005).

142. International Federation of the Phonographic Industry, *Recording industry welcomes police investigation of Allofmp3.com* (Feb. 22, 2005), available at <www.ifpi.org/site-content/press/20050222.html>.

143. *Id.*

144. MusicAlly, *supra* note 2.

145. *Id.*

146. Federal Law No. 72-FZ of July 20, 2004 on Amending the Law of the Russian Federation on Copyright and Neighboring Rights (hereinafter Amendment to Russian Copyright Law). Translation available from Garant-Service, document no. 12036318. See also Russian Organization For Multimedia and Digital Systems, *Legislation*, at <www.roms.ru/?fms=5> (visited Dec. 20, 2005); Coalition for Intellectual Property Rights, *CIPR Alert: Russian Legislative Update*, at <www.cipr.org/news/pressreport/legal\_alert\_81704.htm> (visited Dec. 20, 2005).



public in an interactive manner (i.e. the Internet).<sup>147</sup> Sergei Arsentiev, director of MP3Search, stated that he believed the new legislation may force the Russian management organizations to negotiate agreements with copyright holders. However, the text of the new amendment does not significantly modify the articles dealing with management organizations or compulsory licensing.<sup>148</sup> How the amendment will affect the music web sites is unclear at this time.

In the spring of 2005, the IFPI began taking a more aggressive approach toward the Russian web sites. The IFPI submitted a formal complaint against AllofMP3 on February 8 to the Moscow City Prosecutor's office.<sup>149</sup> On the same date, Moscow City Police completed their investigation of the web site and submitted their findings to the Prosecutor's office.<sup>150</sup> The Moscow Prosecutor's office later declined to take legal action against AllofMP3 claiming Russian copyright laws do not cover digital media.<sup>151</sup> Although the BBC stated this was the reason for the lack of prosecution, it is not entirely clear that Russian Copyright Law does not protect digital media. Article six of the Russian Law on Copyright and Neighboring Rights protects works in an "objective form," which may include fixed works such as "audio or video recording (mechanical, magnetic, digital, optical, and so on)," unfixed works such as "oral (public pronouncement, public performance, and so on)," and a catch-all category of "in other forms."<sup>152</sup>

While the current state of affairs may seem objectionable to foreign copyright holders, Russia is arguably only in violation of its international agreement to protect the broadcast rights of musical composers. Russia is a party to the Berne Convention for the Protection of Literary and Artistic Works (the Berne Convention),<sup>153</sup> but this convention provided no protection for the broadcast rights of phonorecord producers and

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147. *Id.*

148. *Id.* See also Museekster, *MP3Search interview: Sergei Arsentiev, director of MP3Search.ru*, at <[www.museekster.com/mp3searchinterview.htm](http://www.museekster.com/mp3searchinterview.htm)> (visited Dec. 20, 2005).

149. International Federation of the Phonographic Industry, *supra* note 142.

150. *Id.*

151. BBC News, *Legal Okay for Russian MP3 Site*, at <[news.bbc.co.uk/1/hi/technology/4328269.stm](http://news.bbc.co.uk/1/hi/technology/4328269.stm)> (visited Aug. 29, 2005).

152. Russian Copyright Law, *supra* note 132, art. 6(2). See also Doris Estelle Long, *The Protection of Information Technology in a Culturally Diverse Marketplace*, 15 J. MARSHALL J. COMPUTER & INFO. L. 129, 138-39 (1996).

153. World Intellectual Property Organization, *Treaties Database, Contracting Parties: Contracting Parties > Berne Convention*, at <[www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty\\_id=15](http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=15)> (visited Feb. 5, 2005).

performers.<sup>154</sup> This is because many contracting parties do not recognize sound recordings as literary or artistic works, which is required in order to receive protection under the convention.<sup>155</sup> However, the Berne Convention does consider musical compositions to be literary or artistic work and therefore deserving of protection, including an exclusive right of broadcasting.<sup>156</sup> Russian law does not provide compensation to or require authorization from the musical composers, and therefore Russia is not living up to its obligations under the Berne Convention, at least in the protection of musical compositions.<sup>157</sup>

Russia does not appear to be in violation of its other international agreements. The WIPO Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of Their Phonograms (the Geneva Convention) does apply to sound recordings. However, the convention only applies to their duplication, distribution and importation, and it does not explicitly apply to the broadcasting of sound recordings.<sup>158</sup> The International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (the Rome Convention) requires a performer's consent to broadcast a live (unfixed) performance, but it does not require a performer's consent to broadcast a recorded (fixed) performance.<sup>159</sup> The Rome Convention requires producers and/or performers to be paid a single equitable remuneration for the broadcast, but it allows for domestic laws to determine the remuneration in the absence of an agreement.<sup>160</sup> Russia's system of payments to management organizations may be sufficient under the Rome Convention. In addition, while the Russian Federation is a member of the Rome Convention, the

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154. Berne Convention for the Protection of Literary and Artistic Works, July 24, 1971, S. TREATY DOC. 99-27 (hereinafter Berne Convention); MOSER, *supra* note 120, at 147; SAM RICKETSON, *THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886-1986* 866-70 (1987).

155. MOSER, *supra* note 120, at 147; RICKETSON, *supra* note 154, at 866-70; Berne Convention, *supra* note 154, art. 9(3), 11.

156. Berne Convention, *supra* note 154, at art. 2(1), 11bis(1)(ii). *See also International Copyright: An Introduction*, in *INTERNATIONAL COPYRIGHT LAW AND PRACTICE* § 4[1][c][ii] (2005).

157. *See discussion supra* pp. 288-89.

158. Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, Oct. 29, 1971, T.I.A.S. 7808.

159. International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Oct. 26, 1961, art. 7(1), 496 U.N.T.S. 43 (hereinafter Rome Convention). *See also* OWEN MORGAN, *INTERNATIONAL PROTECTION OF PERFORMERS' RIGHTS* 156 (2002).

160. Rome Convention, *supra* note 159, art. 12.

United States is not.<sup>161</sup>

The WIPO Performances and Phonograms Treaty (WPPT) does include an exclusive right for producers of phonorecords to authorize "the making available to the public of their phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them" and to demand equitable remuneration for the broadcast of their phonorecords.<sup>162</sup> However, Russia is not currently a contracting party to this agreement.<sup>163</sup> Finally, even if the Russian Federation becomes a full member of the World Trade Organization, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), this will be of little help because it also does not have sufficient protections for fixed performances. Article 14 of the TRIPS agreement only gives performers the possibility of prohibiting the broadcasting to the public of "their live performance,"<sup>164</sup> and this ability does not even extend to taped performances before a live audience.<sup>165</sup>

### Enforcement against the Users

If the pursuit of the web sites in Russia ultimately proves futile, the copyright holders' only option to protect their interests may be to pursue the U.S. users of the web sites. As previously stated, the downloading of copyrighted material from Russia would likely be seen as a violation of U.S. copyright law when that material is copied to the user's hard drive.<sup>166</sup> The difficulty in bringing these users to justice, either in a civil or criminal court, will be discovering their identity. Obtaining information about the infringers purchasing music from the Russian web sites will be more difficult than obtaining information on P2P network traders. With a P2P network, a copyright holder can discover the IP (Internet Protocol) address of an uploading person by downloading from that person, and can determine who the downloaders are by providing the file for download

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161. World Intellectual Property Organization, *Treaties Database, Contracting Parties: Contracting Parties > Rome Convention*, available at <[http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty\\_id=17](http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=17)>.

162. Performances and Phonograms Treaty, Dec. 20, 1996, art. 14, 15 S. TREATY DOC. No. 105-17.

163. World Intellectual Property Organization, *Treaties Database, Contracting Parties*, at <[www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty\\_id=20](http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=20)> (visited Feb. 5, 2005).

164. Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), Apr. 15, 1994, 1869 U.N.T.S. 299.

165. MORGAN, *supra* note 159, at 158-59.

166. See discussion *supra* pp. 277-78.

themselves.<sup>167</sup> However, when a person purchases and downloads a music file from a web site, there are few openings for the copyright holder to infiltrate the transaction.

Barring wholesale monitoring of Internet communications, the only practical source for this information will be the Russian web sites themselves. Assuming that the web sites will not be favorably disposed to releasing customer information, some court compulsion will be required. In this way, international treaties may be of aid to the copyright holder, as both the United States and the Russian Federation are contracting parties to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters.<sup>168</sup> This convention allows a judicial authority to create a letter of request for evidence from a competent authority in another contracting state.<sup>169</sup> Furthermore, in order to meet their treaty obligations, the Russian authorities will be forced to comply with the letter regardless of whether the Russian web sites are operating legally under Russian law.<sup>170</sup> Likely, the only information available from the Russian web sites will be the purchased songs, the users' email, the users' IP address, and the means of payment.<sup>171</sup> Following the money trail may be the best option for the copyright holder in order to obtain personal information about the users. Once the copyright holder has the means of payment, contacting the financial institution should eventually lead back to the user unless there is some further fraud involved. The IP address may provide some information, but there is no guarantee that the ISP would willingly divulge users' information, and following the decision in the *Verizon* case,<sup>172</sup> there is no guarantee that a court would force the ISP to divulge the information either. As such, pursuing the IP address would likely be a waste of time and effort on the part of the copyright holders. The question will remain whether the copyright holders will want to go through the effort of tracking down all the users, or simply file a few lawsuits in the hope of scaring others.

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167. Kristyn Maslog-Levis, *Witness Assaults Kazaa Filter Claims*, at <[news.com.com/Witness+assaults+Kazaa+filter+claims/2100-1027\\_3-5474498.html](http://news.com.com/Witness+assaults+Kazaa+filter+claims/2100-1027_3-5474498.html)> (visited Dec. 20, 2004).

168. Hague Conference on Private International Law, *Member States*, available at <[hcch.e-vision.nl/index\\_en.php?act=states.listing](http://hcch.e-vision.nl/index_en.php?act=states.listing)>.

169. Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, July 27, 1970, art. 1, 23 U.S.T. 2555.

170. *Id.* art. 12.

171. AllofMP3 states that it collects user name, country of origin, email, means of payment, and IP address. AllofMP3, *Privacy Policy*, at <[help.allofmp3.com/help/help.shtml?prm=privacy](http://help.allofmp3.com/help/help.shtml?prm=privacy)> (visited Feb. 5, 2005).

172. *Verizon*, 351 F.3d at 1229.

## Conclusion

A person should never forget that while making purchases in cyberspace, he lives in the real world and the laws of his country apply to him. A U.S. user should not be under the impression that these web sites are legal or safe to use. Whether or not the authorities in the Russian Federation will eventually crack down on these web sites, U.S. users should know that they are violating U.S. copyright laws when making an unauthorized copy of a song. Further, there are no legal loopholes through which one may justify downloading the copyrighted material.

If there is anything else that should be learned from the experience with these web sites, it is that there needs to be a greater respect around the world for sound recording copyrights. As the Internet spreads around the world, copyright holders will find that protecting their works will become increasingly difficult. These copyright holders may be able to find some justice by pursuing actions against domestic infringers, but without a more global system of enforcement, these actions will largely be symbolic. Without such global enforcement of these rights, the sale of recorded music will eventually go the way of the dodo as artists and producers no longer receive enough financial incentive to do their work. It is doubtful that performed music will ever go away, but quality recorded music might.